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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 829

GEORGE NEFF ROWE,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT CLAIMS

Petitioner, George Neff Rowe, prays that a writ of certiorari issue to review the final order of the United States Court of Claims of July 17, 1964, and the order of court of October 16, 1964, denying petitioner's motion for rehearing, whereby the claim filed by the petitioner was dismissed in that court.

THE OPINION BELOW

The opinion of the United States Court of Claims dated July 17, 1964, printed on pages 20-42 of the Appendix to this petition, is as yet unreported and the order of October 16, 1964, denying petitioner's motion for rehearing, not reported, is printed on page 43 of the Appendix to this petition.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 17, 1964. Rehearing was denied October 16, 1964. The jurisdiction of this court is invoked under 28 U.S.C. Section 1255.

QUESTIONS PRESENTED

1. Whether Air Force Regulation 39-17, under which the petitioner was given an undesirable discharge from the Air Force, was applied in an unreasonable and arbitrary manner since it was based upon offenses for which the petitioner had already been tried and punished under the Uniform Code of Military Justice, and thus petitioner's rights under the Fifth Amendment to the Constitution were abridged.

2. Whether a commander in the Air Force can circumvent the Uniform Code of Military Justice and award a punitive discharge for acts punishable by the Code when a court-martial has not done so, and thus petitioner's rights under the Fifth Amendment to the Constitution were abridged.

3. Whether the issuance of a punitive discharge to a person in the Armed Forces who is opposed thereto violates the Fifth and Eighth Amendments to the Constitution of the United States.

4. Whether the Air Force can ignore its own regulations and a statute leading to a full and fair hearing prior to the discharge of one of its members for physical disability where such disability is alleged to be "alcoholism".

STATUTES INVOLVED

Article 44(a) of the Uniform Code of Military Justice, 70A Stat. 52, 10 U.S.C. Section 844(a) provides:

> No person may, without his consent, be tried a second time.

Part IV, which includes Articles 16-21, of the Uniform Code of Military Justice, 70A Stat. 42-44, 10 U.S.C. Section 816-821, in pertinent part prescribes that courts-martial convened under the Uniform Code of Military Justice shall have jurisdiction to try a person subject to such Code for offenses made punishable by such Code and that concurrent jurisdiction exists with respect to military commissions, provost courts and other military tribunals in respect to offenders or offenses that may by statute or by laws of war be tried by such military commissions, provost courts or other military tribunals.

10 U.S.C. Section 8811(b), 70A Stat. 544, provides:

> No enlisted member of the Air Force may be discharged before his term of service expires, except—
>
> (1) as prescribed by the Secretary of the Air Force;
>
> (2) by sentence of a general or special court-martial; or
>
> (3) as otherwise provided by law.

Section 413 of the Career Compensation Act of 1949, 37 U.S.C. (1952 edition) 283, 63 Stat. 823, provides:

> The Secretary concerned shall prescribe regulations for the administration of this title within his department or agency, including regulations which shall provide that no member of the uniformed services shall be separated or retired for physical disability without a full and fair hearing if such member shall demand it.

REGULATIONS INVOLVED

The pertinent Air Force regulations, Air Force Regulation No. 39-17 (9 February 1954) and Air Force Manual 35-4, have their pertinent provisions printed on pages

34-41 of the Appendix as part of the Findings of Fact of the Opinion of the United States Court of Claims.

STATEMENT OF THE CASE

The petitioner served for some ten years on active duty with the armed forces (R. 18, 19). His first period of service was for approximately five and one half years in the Navy which was terminated in 1948 under (subsequently determined) honorable conditions (R. 18). While in the Navy, petitioner suffered a serious injury to his head which required about fifteen days of hospitalization. This injury was incurred in line of duty (R. 18).

About one year after being discharged from the Navy, the petitioner enlisted in the Army and later when the Air Force became a separate service was transferred to the Air Force (R. 18). In the Air Force, the petitioner underwent a splenectomy as a consequence of an injury suffered in line of duty. Even though a splenectomy is considered to be thirty percent disabling under the Veterans Administration Schedule for Rating Disabilities, the petitioner was continued on active duty and he was honorably discharged from the Air Force and re-enlisted in 1952 (R. 18, 19, 28, 29).

In the period of June 1953-April 1954, the petitioner was convicted by summary court-martial or punished under Article 15 of the Uniform Code of Military Justice for some seven offenses involving drinking (R. 19). On December 10, 1953, the petitioner was punished for four of such offenses under Article 15 whereby he was restricted to the base for some four weeks and given two hours a day extra duty for each day thereof (Joint Exh. 2, p. 39). Although this is three times the maximum punishment authorized under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, 70A Stat. 41, the petitioner did not complain and underwent the punishment. A summary court-martial sentence for another of the of-

fenses was adjudged and approved on January 25, 1954, for a forfeiture of $65 and restriction to the limits of his duty station for a period which exceeded by one day the maximum period of restriction permitted by law (Art. 19, UCMJ, 10 U.S.C. 819, 70A Stat. 43). Again, petitioner did not complain but carried out his punishment. (Joint Exh. 2, p. 36)

/ For the other offenses, in each case the petitioner was awarded at least the maximum amount of punishment permitted by law. (Joint Exh. 2, p. 40, 44, 45)

Despite the foregoing offenses, the record is clear that the petitioner performed his military duties, as a cook, in an effective manner. Regardless of this, petitioner's immediate commanding officer on May 6, 1954, initiated steps leading towards petitioner's undesirable discharge and pursuant thereto caused the petitioner to be given what is described as a psychiatric examination which found him to be suffering from alcoholism. It was the opinion of the medical officer giving the examination that no mental or physical defect existed which warranted petitioner's disposition through medical channels. By this it was meant that it was not considered that petitioner was suffering from a disability which might lead to his separation or retirement therefor. The report of the medical officer, however, makes no mention of petitioner's thirty percent disabling splenectomy. Also, no mention is made of the prior head injury. (Joint Exh. 2, p. 33, 34, R. 19, 20)

Soon after this examination the petitioner was again in difficulty involving drinking and charges under Article 134 of the Uniform Code of Military Justice were brought against him. On May 24, 1954, the petitioner was tried for such offenses by a special court-martial and found guilty as charged. The sentence was restriction to the base for three months (even though two months restric-

tion is the maximum permitted by law)[1] and forfeiture of $65 per month for four months. Four members of the court-martial recommended clemency (R. 20). They recommended that every available effort be made through medical care and other facilities available in the Air Force to aid the airman.

After petitioner had been charged with the offenses for which he was later tried by court-martial, but before the court-martial itself, petitioner's immediate commanding officer recommended to the commander of petitioner's duty station that the petitioner appear before a Board of Officers convened under Air Force Regulation 39-17 to determine petitioner's fitness for retention in the service. No mention was made of petitioner's splenectomy or head injury. (Joint Exh. 2, p. 28-35)

Such recommendation was approved by the commander of petitioner's duty station and following the court-martial, on May 28, 1954, the petitioner appeared before a designated Board of Officers. By regulation, before petitioner was to appear before such Board, he was supposed to have a further physical examination to determine whether any mental or physical defect of sufficient import existed to warrant action, Air Force Manual 35-4 (pertaining to disability separation or retirement). The regulations required 'when physical or mental defects of major import are involved, the medical officer will submit to the board a concise report in which the essential points of the mental and physical condition of the airman are described, ..." However, such an examination and report was not ordered or made. (R. 25, Joint Exh. 2, p. 1-22)

At the Board, the petitioner was represented by counsel but there is no indication that such counsel was a lawyer and no requirement that he so be. Among other

[1] Manual for Courts-Martial, United States, 1951, p. 209.

things evidence was introduced before the Board of the offenses for which the petitioner had just been court-martialed some four days previously. (Joint Exh. 2, p. 3)

With reference to the petitioner's work, his immediate commanding officer testified that his work was favorable. In fact he had no complaints at all concerning his work and considered him a very good cook. To his knowledge, petitioner had never come to work under the influence of alcohol nor did he recall that he had ever reported late for work because of drunkenness. In addition, he had not received any complaints of drunkenness which occurred either in the barracks or on when petitioner was on duty. (Joint Exh. 2, p. 6)

The Board called as a witness one Technical Sergeant Howard M. Campbell who was petitioner's supervisor. He testified that the petitioner was an excellent cook and a good worker who could accomplish in two hours what it took others a half day to do. (Joint Exh. p. 11)

As a third witness, the Board called Technical Sergeant Herman C. Strickland, who was the food service supervisor having the petitioner in his section. This witness in resumeing his experience with the petitioner stated as follows:

> I would like to state that I have a kind of mixed feeling for him. I have close to 13 years service of which the majority has been in food service career field. Have been Food Service Supervisor since November 1942 and have had a large number of workers working for me, civilians while stationed in China, civilians while in the Philippines and civilians working for me down here. I can truthfully say that during the 12 years I have never had a more willing worker or cook that seemed to take more interest in his work. He is an excellent cook, good worker, does not mind working, doesn't shirk his

> duties at all. Obediently carries out his order to the letter. Does not question why. Another thing I have noticed about him was when he got in trouble and drew a restriction from the delinquency reports received, never once did he break one of those restrictions. It seemed to him that they were military orders to be carried out just like the orders I would give him during his tour of duty and he would carry them out. Never had him to report for duty under the influence of whiskey, nor have him to drink while on duty, or leave duty before being properly released. . . . I would like to go on record as saying that I feel the Air Force, doing what it is to retain experienced personnel, they claim it costs a good deal of money to train them, it seems to me if it is at all possible to give this man some kind of medical treatment to correct the disease, that I feel he has just as much of a disease as if he had TB, and reclaim him for the military service, it would not only be doing the man a big favor, but would also be a benefit to the service. You do not get the high calibre of working men every day that you have in this man. I have men down there that I could gladly spare two of, the service I get from them, better than this one man. . . . (Joint Exh. 2, p. 11-12)

Despite such evidence the Board recommended that the petitioner be given an undesirable discharge from the service because of "habits or traits of character manifested by chronic alcoholism." This was approved by the officer having general court-martial jurisdiction and the petitioner was so discharged on July 1, 1954. At no time did the petitioner give his consent or request such a discharge, but to the contrary he opposed same. The Board in question made no findings and was not authorized to make any findings as provided by Title IV of the Career Compensation Act of 1949, 63 Stat. 816-825, pertaining to members of the armed services who were separated and retired for physical disability. (Joint Exh. 2, p. 1-22)

The petitioner exhausted his administrative remedies before the Air Force Discharge Review Board and the Air Force Correction Board. Because of the undesirable discharge, the petitioner has been denied compensation for his otherwise compensable disability by the Veterans Administration (R-21-23, 29).

Suit was brought in the Court of Claims on the theory that the discharge was not validly issued and, accordingly, petitioner had not been legally discharged (R. 1-6).

REASONS FOR ALLOWANCE OF THE WRIT

This case raises questions of fundamental importance concerning the rights of armed forces personnel.

It is singularly clear in this case that the Air Force tried the petitioner under the Uniform Code of Military Justice for a series of offenses for which he was awarded the maximum or more than the maximum punishment the law allowed. He was then taken before a Board of Officers, tried essentially for the same conduct, and awarded a punishment which the U.S. Court of Claims once called in the case of *Clackum* v. *U.S.*, 1960, 296 F.2d 228, "one of the most severe penalties which may be imposed by court-martial." As a result of these proceedings wherein the petitioner was twice placed in jeopardy and doubly punished, he was not only stigmatized for life but also a forfeiture of disability compensation from the Veterans Administration for a thirty percent disability was worked upon him. It is difficult to conceive of a more patent disregard of the protections both as to procedure and the limits of punishment that Congress intended servicemen to have.

Ex parte Lange, 1873, 85 U.S. [18 Wall] 163, established that dual punishment for the same offense was double jeopardy under the Fifth Amendment and this case challenges the application of a regulation which

circumvents the Uniform Code of Military Justice and awards a further punishment, a punitive discharge, for acts punishable by the Code when a court-martial has not done so.

The situation in the instant case is not unlike where a prosecuting attorney would be authorized in a case where he concluded that the sentence was inadequate to impose such additional penalties which he thought the accused person deserved.

The Commissioner of the Court of Claims considered the treatment of the petitioner was justified on the basis of the decision of the Court of Claims in *Jackson* v. *United States*, No. 403-60, decided January 12, 1962, 297 F.2d 939, *certiorari granted*, 371 U.S. 900, *certiorari dismissed under Rule 60*, 372 U.S. 950. In *Jackson*, the Court of Claims found an undesirable discharge on the basis of a conviction by an Oklahoma court which was subsequently set aside on appeal to be justified.

The Court of Claims, being aware that certiorari had been granted in *Jackson*,[2] omitted the *Jackson* citation from its opinion—otherwise identical with that of the Commissioner—and substituted therefor the case of *Grant* v. *United States*, No. 30-60, decided July 12, 1963. The *Grant* case, however, did not involve an undesirable discharge. On the motion for rehearing, the Government argued that *Grant* was, nevertheless, a proper basis for the action by the Court of Claims inasmuch as *Grant* stood for the proposition that an undesirable discharge as an administrative discharge is not a punitive discharge.

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[2] This was clear from specific comments of judges of the Court of Claims in oral arguments. At least one judge appeared to feel that the Department of Justice should not have settled *Jackson* after certiorari had been granted.

It is thus clear to all familiar with military law that the instant case stands for the proposition that an undesirable discharge is not a punitive discharge. This we challenge. Indeed, the legal and practical disabilities attending the issuance of a bad conduct discharge by court-martial sentence (with numerous legal safeguards prescribed by law) and those of an undesirable discharge (without such safeguards) are essentially identical. In fact, it would seem that the undesirable discharge is probably the more odious of these twin malefactors since it frequently connotes homosexuality.[3]

The Court of Claims is turning back the clock fifty years to *Reid* v. *U. S.*, S.D.N.Y., 1908, 161 Fed. 469, where the view was taken that the character of an undesirable discharge was not punishment. This view is diametrically opposite to an earlier and more enlightened decision by the Court of Claims, *Clackum* v. *United States*, 246-56, January 20, 1960, 296 Fed. 2d 228, wherein it was stated:

> A dishonorable discharge is, for a soldier, one of the most severe penalties which may be imposed by a court-martial. Elaborate provisions for review of court-martial sentences within the military hierarchy, and potentially by the Court of Military Appeals, are included in our military laws. Yet the Air Force regulations discussed above provide that if the evidence at hand is so unsubstantial that a conviction by a court-martial would be unlikely, the executive officers of the Air Force may themselves convict the soldier and impose the penalty. It is as if a prosecuting attorney were authorized, in a case where he concluded that he didn't have enough evi-

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[3] So testified Chief Judge Quinn of the Court of Military Appeals, Committee Print, Constitutional Rights of Military Personnel, Summary—Report of Hearings by Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Pursuant to S. Res. 58, 88th Congress, 1st Session, p. 2.

> dence to obtain a conviction in Court, to himself impose the fine or imprisonment which he thought the accused person deserved.
>
> The Government defends this remarkable arrangement, and its operation in the instant case, on the ground that it is necessary in the interest of an efficient military establishment for our national defense. We see nothing in this argument. The plaintiff being a member of the Air Force Reserve, on active duty, the Air Force had the undoubted right to discharge her whenever it pleased, for any reason or for no reason, and by so doing preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties. It is late in the day to argue that everything that the executives of the armed forces do in connection with the discharge of soldiers is beyond the reach of judicial scrutiny. *Harmon* v. *Brucker*, 355 U.S. 579.

It is inconsistent with *Bland* v. *Connally*, C.C.A. D. C. 1961, 293 F.2d 852, wherein Judge Washington stated on page 858:

> What is at stake, therefore, is merely the Navy's right to punish or label, and not its right to secure itself against subversives. . .
>
> . . . We think it must be conceded that any discharge characterized as less than honorable will result in serious injury.

It contrasts with the viewpoint of the Court of Military Appeals, which in a compartively recent report[4] stated:

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[4] Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury pursuant to the Uniform Code of Military Justice for the Period January 1, 1960 to December 31, 1960, p. 12.

> The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Major General Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, California, August 26, 1958. He there declared that the tremendous increase in undesirable discharges by administrative proceedings was a result of efforts of military commanders to avoid the requirements of the uniform code. Although he acknowledged that men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated.

It is contrary to the information of Senator Sam J. Erwin, Jr., senior United States Senator of the State of North Carolina who, as Chairman of the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary, has been conducting a congressional study of the constitutional rights of military personnel. The Senator, in a speech published in full in the *Judge Advocate Journal*, Bulletin No. 35, June, 1963, stated as follows:

> . . . . . Proceeding first to the administrative discharge under other than honorable conditions, I find it indisputable that such a discharge can be as damaging as a punitive discharge imposed by a court-martial. In fact, the Subcommittee has been told that some would prefer a bad conduct discharge from a special court-martial to an undesirable discharge issued administratively.
>
> Secondly, the effects of a discharge under other than honorable conditions, however imposed, are not limited to the military career of the person affected; instead such a discharge will follow the individual the rest of his life; it will affect his reputation, his job opportunities, and his veterans benefits. . . .

> . . . . . If the allegations against the serviceman constitute a violation of the Uniform Code for which he could be court-martialed, especially if the serviceman requests a court-martial, in which he would have the safeguards prescribed by the Uniform Code, then the Services should not be able to accomplish indirectly what they could not do directly. That is, they should not be able to adjudge a man guilty and stigmatize him with an undesirable discharge without granting him the procedural protections that Congress intended he have. Of course, I would not dispute the Services' power under such circumstances to discharge the man under honorable conditions; but that power has not been at issue.

It well may be that in the days of *Reid*, an undesirable discharge had little effect on a man's subsequent life other than on his eligibility for Veterans Administration benefits and was comparable to being "fired" from any other job. This situation no longer prevails. Today, beyond dispute, the punitive nature of the discharge is treated by employees in much the same light as a conviction for a felony and effectively bars the individual from the pursuit of many vocations irrespective of his talents. Yet it is given for trivial offenses, often to minors, and the undesirable discharge is frequently awarded where a court-martial could not do so. Discharges of dishonorable nature punish unequally and often harshly. In this age of the job application form and background investigation, the dishonorable discharge constitutes a modern scarlet letter and a cruel and inhuman punishment for the type of offenses generally involved. This case challenges the constitutionality of such punishment.

Under the Table of Maximum Punishments for the Uniform Code of Military Justice,[5] a bad conduct discharge is not permitted for trivial offenses unless there

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[5] Manual for Courts-Martial, United States, 1951, p. 228.

is a previous record of at least two previous convictions under court-martial in the individual's record. Here the petitioner had only one such previous court-martial conviction at the time of his second court-martial. In effect, the Uniform Code of Military Justice gives a member of the services three "strikes" before he is "out". By regulation, the Secretary has changed this rule to two or even less "strikes"—depending upon the initiative of the local commanding officer to process the individual for an undesirable discharge.

This case challenges the authority of the Secretary of the Air Force to diminish the rights which Congress has given to servicemen under the Uniform Code of Military Justice before they can be given a punitive discharge.

The instant case is unique in that all the evidence indicates the petitioner's military record for the period of service which terminated in the undesirable discharge was good except, and only except, for those offenses for which he was punished. Based upon such offenses, the petitioner was considered to be suffering from alcoholism.[6] Under Air Force regulations in effect at the time of petitioner's discharge, "physical disability" was defined as any manifest or latent impairment of function due to disease or injury regardless of the degree of impairment (R. 28). If the petitioner was suffering from alcoholism, a disease, it follows that he had a "physical disability" as defined and, under the Air Force regulations, should have been referred to a medical board and ultimately to a physical evaluation board where he would have been given a statutory full and fair hearing under the criteria set forth in Title IV of the Career Compensation Act of 1949. This is the case without even

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[6] At least one doctor subsequently diagnosed petitioner's condition as "Schizophrenic Reaction, Catatonic Type". See report of Dr. Y. Takahashi in record of proceedings of Air Force Board for Correction of Military Records.

considering the petitioner's splenectomy which was ratable at thirty percent under the Veterans Administration Schedule for Rating Disabilities and serves to emphasize the cavalier treatment which petitioner has received.

In connection with the foregoing it will be noted that the Regulations of the Air Force in force when petitioner was being processed for his discharge (AFM 35-4, Chapter 2, Subsection 7) provided that a patient whose fitness for further duties appears, for medical reasons, to be "in doubt" will be referred to a medical board. The regulation pursuant to which the petitioner was discharged, AFR 39-17, provides that the discharge of enlisted personnel under such regulation will be accomplished only after a "conclusive determination" has been made that a mental or physical defect does not exist which would warrant consideration under AFM 35-4, which is a regulation dealing with separations and retirement for physical disability (R. 23, 28).

Here the petitioner was at least thirty percent disabled under the Veterans Administration Schedule for Rating Disabilities. Yet no reference was made to the existence of such disability in the report submitted by the medical officer in the case. Nor did the immediate commanding officer in his recommendation make any mention of such disability. What is required to be "in doubt" or for "conclusive determination" so as to preclude petitioner's consideration by a medical board!!?

Moreover, after it was determined to refer the petitioner to a Board of Officers, under the regulations he should have been scheduled to appear before the unit medical officer or base surgeon to ascertain whether any mental or physical defect of sufficient import to warrant action under AFM 35-4 existed. If the medical officer did not consider such defect to exist, he was to submit to the Board a concise report in which the

essential points of the mental or physical condition of the petitioner were described. This was not done in petitioner's case and apparently the requirement was completely overlooked (R. 25).

This court in *Burns* v. *Wilson*, 1953, 346 U.S. 137, 142 held that service personnel are protected by the Constitutional guarantee of due process and this case challenges the due process of the procedures utilized to discharge petitioner.

Petitioner was not given an undesirable discharge because his service was undesirable. Rather, he was given such a discharge because he was considered an undesirable type of person. But is this sufficient reason for the Air Force to punish a man—particularly beyond that authorized by the Uniform Code of Military Justice?

The decision of the Court of Claims conflicts with *Harmon* v. *Brucker*, 1958, 355 U.S. 579 and is inconsistent with the language of this Court in *Bell* v. *United States*, 1961, 366 U.S. 393, 401, wherein it is observed:

> In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not accrued pay. But a soldier who has not received such punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be.

This case challenges a procedure which punishes a member of the Armed Services merely because in the eyes of someone he may be an undesirable person and not because his conduct has fallen below the specified level.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfuly submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 256-60

(Decided July 17, 1964)

GEORGE NEFF ROWE

v.

THE UNITED STATES

Penrose L. Albright for plaintiff. *Mason, Mason and Albright* on the briefs.

Arthur E. Fay, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Senior Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

PER CURIAM: This case was referred pursuant to Rule 45 (since April 1, 1964 Rule 57) to Trial Commissioner Mastin G. White, with directions to make findings of fact and recommendations for conclusion of law. The Commissioner has done so and has written an opinion with which we agree and which we adopt with minor modifications. This case differs from *Sofranoff* v. *United States*, Ct. Cl. No. 9-62, decided April 17, 1964, in that the pertinent regulations were not followed in that case, whereas they were followed in the present case. Plaintiff, is therefore, not entitled to recover, and his petition is dismissed.

The opinion, as modified, is as follows:

The plaintiff, who had served in the Armed Forces as an enlisted man for more than 10 years, was given an undesirable discharge by the Air Force on July 1, 1954. The Air Force purported to act in accordance with Air Force Regulation No. 39-17 (9 February 1954). At the time of this discharge, the plaintiff was serving under a 6-year enlistment in the Air Force, and he had completed only a little more than one-third of the 6-year term.

The plaintiff alleges in the first amended petition that the undesirable discharge of July 1, 1954, "was invalid and illegal and did not effect his separation from the Air Force * * *." He accordingly seeks in the present action to recover military pay and allowances for the period commencing July 2, 1954, the day after he was discharged. The plaintiff states in this connection that he is entitled to recover pay and allowances up to the date of judgment, but it should be noted at the outset that any recovery would necessarily be limited to the unexpired portion of the 6-year term of the enlistment from which the plaintiff was discharged. *Murray* v. *United States*, Ct. Cl. No. 237-57, decided June 7, 1961, p. 6 of slip copy; *Smith* v. *United States*, Ct. Cl. No. 28-60, decided December 6, 1961, p. 9 of slip copy; *Clackum* v. *United States*, Ct. Cl. No. 246-56, decided March 6, 1963, p. 2 of slip copy.

The plaintiff's allegation of invalidity and illegality respecting the undesirable discharge of July 1, 1954, is based primarily upon the contention that the Air Force, under its own regulations, could not properly issue an undesirable discharge to him without first referring his case to a medical board for a determination as to whether he was entitled to retirement or a discharge because of physical disability. In addition, the plaintiff asserts in a brief filed for the consideration of the commissioner that,

in view of the enactment of the Uniform Code of Military Justice, there is at least substantial doubt whether the Air Force could validly provide by regulation for the administrative issuance of undesirable discharges.

The second of the points mentioned in the preceding paragraph will be discussed first.

It apparently is the plaintiff's theory that any form of discharge certificate issued by a military service which is phrased in derogatory language and which diminishes the benefits that otherwise would be available to the discharged serviceman is a punitive discharge; and since Congress, in the Uniform Code of Military Justice enacted as Section 1 of the Act of May 5, 1950 (64 Stat. 107),[1] expressly authorized courts-martial to adjudge dishonorable discharges and bad-conduct discharges as punishments against persons convicted of criminal offenses defined in the Code, this impliedly prohibited the military services from providing by regulation for the administrative issuance of any sort of derogatory discharge that would disminish the benefits otherwise available to the discharged person.

It is pertinent to observe that the same statute which enacted the Uniform Code of Military Justice also provided in Section 6 (64 Stat. at p. 145) that the former Article of War 108, as amended (41 Stat. 809), should continue to have the same force, effect, applicability as theretofore, although it should no longer be known as an Article of War. The statutory provision formerly designated as Article of War 108 declared in part that no enlisted man should be discharged before the expiration of his term of service except by order of the President, or by order of the Secretary of the military department

[1] The Uniform Code of Military Justice is now incorporated in Title 10 of the United States Code as Chapter 47.

in which he was serving,[2] or by sentence of a court-martial. Substantially similar statutory language had been in effect since the enactment of Article of War 11 by the Act of April 10, 1806 (2 Stat. 359, 361); and it had been judicially held that such language granted to the executive branch of the Government authority to determine the form and terms of discharge certificates to be issued administratively to discharged military personnel (*Davis* v. *Woodring*, 111 F. 2d 523, 525 (D.C. Cir., 1940)), it being sufficient if the form and terms of a discharge certificate adequately indicated the nature of the service performed (*Patterson* v. *Lamb*, 329 U.S. 539, 545 (1947)). Furthermore, this executive authority had been held to extend to the issuance administratively of discharges without honor. *Reid* v. *United States*, 161 Fed. 469, 472 (S.D.N.Y., 1908). Congress showed a clear intention, in Section 6 of the same statute which enacted the Uniform Code of Military Justice, that the executive authority respecting military discharges should continue and should not be affected by the enactment of the Code.

The authority of the Secretary of the Air Force, subsequent to the enactment of the Uniform Code of Military Justice, to provide by regulation for the administrative issuance of undesirable discharges was upheld by this court in the case of *Grant* v. *United States*, No. 30-62, decided July 12, 1963.

On the basis of the decision in the *Grant* case, it is necessary to reject the plaintiff's contention in the present case that the Secretary of the Air Force could not validly provide by regulation for the administrative issuance of undesirable discharges.

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[2] Article of War 108 referred to the Secretary of War, but the powers of that office devolved upon the Secretary of the Army and the Secretary of the Air Force by virtue of Title II of the National Security Act of 1947 (61 Stat. 495, 499).

Of course, regulations promulgated by the Secretary of a military department to govern the administrative issuance of discharges that disadvantage the discharged person with respect to future benefits must meet the basic requirements of due process of law. *Clackum* v. *United States*, 148 Ct. Cl. 404, 408, 410 (1960); *Bland* v. *Connally*, 293 F. 2d 852, 858, 860 (D.C. Cir., 1961). Furthermore, whatever regulations may be promulgated must be followed by a military service in connection with the issuance of such discharges. *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-540 (1959); *Murray* v. *United States*, *supra*, at p. 6 of slip copy; *Smith* v. *United States*, *supra*, at p. 9 of slip copy.

This brings us to a consideration of the contention made by the planitiff in the present case that, under the Air Force's own regulations, it could not properly issue an undesirable discharge to the plaintiff without first referring his case to a medical board for a determination as to whether he was entitled to retirement or a discharge because of physical disability.

At the time pertinent to this litigation, Air Force Regulation No. 39-17 constituted the authority within the Air Force for the discharge of enlisted personnel because of "unfitness." The grounds for the issuance of such a discharge were set out in the regulation, and these included "evidence of habits or traits of character manifested by * * * chronic alcoholism * * *," this being the particular ground that was involved in the plaintiff's case. The regulation prescribed a rather elaborate procedure, which included the convening of a board of officers to consider the case of an enlisted man whose discharge for unfitness had been recommended, the holding of a hearing by the board, and the right of the affected person to appear before the board in person and to be represented by counsel. The board could recommend that

the affected person be discharged because of unfitness and be given an undesirable discharge, or that he be discharged because of unsuitability under Air Force Regulation No. 39-16 and be given a general discharge, or that he be retained in the service. The board's action was subject to consideration and approval or disapproval by the convening authority and by the commander exercising general court-martial jurisdiction.

The plaintiff apparently relies upon the portion of Air Force Regulation no. 39-17 which declared that a discharge under the regulation could be accomplished only after "Conclusive determination has been made that a mental or physical defect does not exist which would warrant consideration under AFM 35-4." In this connection, the plaintiff, prior to his appearance before the board of officers set up under Air Force Regulation No. 39-17, was given an examination by an Air Force medical officer. The diagnosis was "Alcoholism, chronic, moderate, manifested by excessive drinking, disorderly behavior when under the influence of alcohol * * *." The medical officer concluded that there were no mental or physical defects which warranted disposition of the plaintiff's case through medical channels, and recommended that the plaintiff be separated from the service under the provisions of Air Force Regulation No. 39-17 because of alcoholism.

According to the plaintiff, the conclusion that there were no mental or physical defects warranting disposition of his case through medical channels was erroneous. The plaintiff refers to the fact that, as shown by his medical records in the Armed Forces, he once sustained a head injury which required that he be hospitalized for about 15 days, a splenectomy was performed upon him, and he was a chronic alcoholic.

The plaintiff calls attention to Air Force Manual 35-4, which was cited in Air Force Regulation No. 39-17 and

which covered the subject of retirement and separation of military personnel by virtue of physical disability. The manual provided in part that:

> A patient who is unfit or whose fitness for further general military service appears, for medical reasons to be in doubt will be referred to a medical board. * * *

The plaintiff argues that his case, because of the head injury, the splenectomy, and his chronic alcoholism, came within the scope of the quoted language, and, therefore, that it was necessary for the Air Force to refer his case to a medical board for consideration of the question whether he was entitled to retirement or a discharge because of physical disability, before the Air Force could properly decide on the issuance of an undesirable discharge to him.

The head injury mentioned by the plaintiff was sustained on or about June 10, 1947, while the plaintiff was serving as an enlisted man in the Navy. He was hospitalized for this injury until on or about June 25, 1947. Thereafter, the plaintiff continued to serve in the Navy until February 6, 1948, when he was discharged. A year later, he enlisted in the Army, and he served as a soldier for more than 4 months, after which he was transferred to the Air Force. The plaintiff served in the Air Force for more than 5 years, which involved a reenlistment. Each enlistment and reenlistment involved a medical determination by the military authorities that the plaintiff was physically qualified to perform full military duty. Moreover, the plaintiff has not presented to the court evidence proving that, after the period of hospitalization in June 1947, the plaintiff's physical capacity to perform full military duty was affected by the 1947 head injury. Consequently, the mere fact that this head injury occurred in 1947 was not sufficient to raise a doubt concerning the plaintiff's physical fitness to per-

form the duties of his grade at the time in 1954 when his case was being processed under Air Force Regulation No. 39-17.

The splenectomy was performed on the plaintiff in November 1950, while he was serving with the Air Force. After the operation, the plaintiff had a 60-day period of convalescence, and he was then assigned light duties for a period of 3 or 4 weeks. At the end of the latter period, the plaintiff was given regular duties to perform. He served out his then current enlistment and was discharged by the Air Force on February 13, 1952. The next day, the plaintiff reenlisted in the Air Force; and he served under that enlistment until the discharge of July 1, 1954, that is involved in the present litigation. The reenlistment in 1952 involved a medical determination by the military authorities that the plaintiff was physically qualified at the time, notwithstanding the splenectomy, to perform full military duty. The plaintiff has not attempted to rebut this by introducing evidence for the purpose of proving that, after the period of convalescence and the period of light duties previously mentioned, the 1950 splenectomy actually affected his physical capacity to perform full military duty during the remaining years of his military service. The plaintiff seems to regard as conclusive the circumstance that, at the time of the plaintiff's discharge on July 1, 1954, the Veterans Administration rated a splenectomy as a 30-percent disability. This is immaterial, however, as the disability ratings of the Veterans Administration are based upon statutes and regulations different from those that govern the retirement or discharge of military personnel. *Holliday* v. *United States*, 128 Ct. Cl. 647, 649 (1954).

We turn now to a consideration of the plaintiff's chronic alcoholism, which, according to the Air Force's determination, rendered the plaintiff unfit for continuation in the service. The plaintiff refers to the dictionary defi-

nition of alcoholism as "A diseased condition caused by the excessive use of alcoholic liquors" (WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d edition, unabridged); and he contends that his chronic alcoholism was at least sufficient to raise a doubt as to whether his unfitness for further general military service was attributable to medical reasons, within the meaning of the sentence previously quoted from Air Force Manual 35-4, thus making it necessary that his case be referred to a medical board for a determination of this question before the Air Force could properly issue an undesirable discharge to him under Air Force Regulation No. 39-17.

It is not necessary for the court to decide whether alcoholism is or is not a disease, from the technical medical standpoint. It is sufficient for the purposes of the present case that the Air Force, in its Regulation No. 39-17, dealt specifically with chronic alcoholism on the part of enlisted personnel and prescribed a procedure whereby such personnel would be discharged from the service. These provisions dealing expressly with chronic alcoholism would necessarily remove alcoholism from the scope of the provisions of Air Force Manual 35-4 dealing generally with the subject of physical disability. *Baltimore Nat. Bank* v. *Tax Commission*, 297 U.S. 209, 215 (1936).

For the reasons indicated above, it is my opinion that the Air Force had the authority to promulgate its Regulation No. 39-17 providing (among other things) for the issuance of undesirable discharges to chronic alcoholics, and that the plaintiff has failed to prove that the Air Force did not act in accordance with this regulation when it issued an undesirable discharge to the plaintiff.

It is my recommendation, therefore, that the petition be dismissed.

FINDINGS OF FACT

1. The plaintiff is a citizen of the United States. He resided at 3805 Military Road NW., Washington, D.C., when this action was initiated.

2. On October 3, 1942, the plaintiff entered upon a period of active duty with the Navy, serving as an enlisted man.

3. (a) On or about June 10, 1947, while the plaintiff was serving on active duty with the Navy, as indicated in finding 2, he suffered an injury to his head, for which he was hospitalized until on or about June 25, 1947. This injury was held to be "LOD" (in line of duty).

(b) The evidence in the record does not show that, after the period of hospitalization mentioned in paragraph (a) of this finding, the plaintiff's physical capacity to perform full military duty was affected by the head injury referred to in paragraph (a) of this finding.

4. (a) On February 6, 1948, the plaintiff was given an undesirable discharge by the Navy.

(b) Subsequently, the Navy Board of Review, Discharges and Dismissals canceled the undesirable discharge mentioned in paragraph (a) of this finding and issued to the plaintiff a discharge under honorable conditions by reason of unsuitability.

5. On February 8, 1949, the plaintiff enlisted in the United States Army. This enlistment involved a medical determination by the military authorities that the plaintiff was physically qualified to perform full military duty. The plaintiff was transferred to the United States Air Force on June 20, 1949.

6. (a) On November 12, 1950, while the plaintiff was serving on active duty with the Air Force under the enlistment referred to in finding 5, a splenectomy was

performed upon him. The splenectomy was held to be incurred in line of duty.

(b) After the splenectomy mentioned in paragraph (a) of this finding, the plaintiff went through a 60-day period of convalescence, and then resumed the performance of military duties. He was assigned light duties for a period of 3 or 4 weeks, and then was given regular duties.

(c) The evidence in the record does not show that, after the period of convalescence and the period of light duties referred to in paragraph (b) of this finding, the plaintiff's physical capacity to perform full military duty was affected by the splenectomy mentioned in paragraph (a) of this finding.

7. On February 13, 1952, the plaintiff was discharged under honorable conditions by the Air Force.

8. On February 14, 1952, the plaintiff reenlisted in the Air Force for a 6-year term. The reenlistment involved a medical determination by the military authorities that the plaintiff was physically qualified to perform full military duty. The plaintiff served under the enlistment of February 14, 1952, until July 1, 1954, when he was discharged as undesirable under circumstances related in subsequent findings.

9. During the period June 1953-April 1954, while the plaintiff was serving in the Air Force under the enlistment mentioned in finding 8, he was convicted by court-martial or punished under Article 15 of the Uniform Code of Military Justice for the following offenses:

(a) being disrespectful toward a commissioned officer, failing to obey a lawful order of a commissioned officer, and disorderly conduct in station on or about June 26, 1953;

(b) being drunk and disorderly in public on or about November 16, 1953;

(c) driving while intoxicated on or about November 22, 1953;

(d) driving while intoxicated on or about December 1, 1953;

(e) being drunk in public on or about December 3, 1953;

(f) being drunk in public on or about January 21, 1954; and

(g) being drunk in public on or about April 21, 1954.

10. On May 6, 1954, the plaintiff was given a psychiatric evaluation by an Air Force medical officer. The diagnosis was "Alcoholism, chronic, moderate, manifested by excessive drinking, disorderly behavior when under the influence of alcohol * * *." The medical officer recommended that the plaintiff "be separated from the military service under the provisions of AFR 39-17 because of alcoholism." In this connection, it was concluded by the medical officer that there were no mental or physical defects which warranted disposition of the plaintiff's case through medical channels, which would have provided the plaintiff with a full and fair hearing by a physical evaluation board.

11. Under the date of May 20, 1954, the commanding officer of the plaintiff's organization, the Unit Command Section, 3625th United States Air Force Hospital, Tyndall Air Force Base, Florida, recommended that the plaintiff appear before a board convened under Air Force Regulation No. 39-17 to determine his fitness for retention in the service. The commanding officer's recommendation stated (among other things) that "Airman has given evidence of chronic alcoholism and disorderly behavior by repeated commission of offenses * * *," and that

"In view of the above pattern of behavior and futile attempts made to effect rehabilitation of this airman, I conclude that it [*sic*] is of minimal benefit to the Air Force and his retention therein would be detrimental to the good of the service."

12. (a) On May 24, 1954, the plaintiff was tried at the Tyndall Air Force Base, Florida, before a special court-martial for allegedly violating Article 134 of the Uniform Code of Military Justice by being drunk at a public place on or about May 13, 1954, and being drunk in station on or about May 15, 1954.

(b) At the conclusion of the trial, the plaintiff was found guilty of the charge and specifications, and he was sentenced to be restricted to the limits of the Tyndall Air Force Base for 3 months and to forfeit $65 per month for 6 months.

(c) A recommendation for clemency, signed by four members of the special court-martial was submitted under the date of May 27, 1954.

13. (a) On May 28, 1954, at the Tyndall Air Force Base, Florida, the plaintiff appeared before a board of officers appointed pursuant to Air Force Regulation No. 39-17 by the commanding officer of the 3625th Flying Training Wing (Interceptor). After a hearing, the board made the following finding:

> The board finds that the respondent properly falls within the category outlined in paragraph 3a(1), AFR 39-17, "habits or traits of character manifested by chronic alcoholism."

The Board made the following recommendation:

> The Board recommends that Airman Basic George N. Rowe be discharged because of unfitness and given an undesirable discharge.

(b) The finding and recommendation of the board were approved by an officer having general court-martial jurisdiction on June 21, 1954.

14. Pursuant to the proceedings mentioned in findings 10, 11, and 13, the Air Force issued an undesirable discharge to the plaintiff on July 1, 1954.

15. (a) On July 9, 1954, the plaintiff requested that the issuance of an undesirable discharge to him on July 1, 1954, be reviewed by the Air Force Discharge Review Board, and that the character of the discharge be changed.

(b) The board concluded, however, that the evidence submitted was insufficient to warrant a change in the type and nature of the plaintiff's discharge.

(c) Accordingly, the Secretary of the Air Force on or about October 20, 1954, directed that the plaintiff's application be denied.

16. Subsequently, the plaintiff applied for a reconsideration of the review of his discharge. This request was denied on or about January 26, 1956.

17. (a) In February 1956, the plaintiff applied to the Air Force Board for Correction of Military Records for a change in the nature of the discharge that was issued to him on July 1, 1954.

(b) The plaintiff's application was denied without a hearing, on the ground that the plaintiff had not submitted sufficient evidence to establish a showing of probable error or injustice.

18. (a) On March 25, 1960, the plaintiff filed another application for relief with the Air Force Board for Correction of Military Records. In this application, the plaintiff requested the following corrective action:

> (1) That on July 1, 1954, I was not discharged from the Air Force, but was retained on duty and

was duly reenlisted on February 14, 1958, for a further period of six years.

(2) In alternative to (1) above; That on July 1, 1954, I was placed on the temporary disability retired list and on July 1, 1959, I was permanently retired for physical disability together with appropriate findings to support such action under the provisions of Title IV of the Career Compensation Act of 1949, as amended, and codified in 10 U.S.C., Ch. 61.

(3) In alternative to (1) or (2) above; That on July 1, 1954, I was discharged from the Air Force with a discharge under honorable conditions.

(b) A hearing was held on July 5, 1961, before the Air Force Board for Correction of Military Records on the plaintiff's application. The plaintiff personally appeared and testified before the board, and he was represented before the board by his present legal counsel.

(c) In passing upon the plaintiff's second application, the Air Force Board for Correction of Military Records made the following findings (among others):

27. On the basis of applicant's record of continuing misconduct without response to rehabilitation efforts, his commander was fully complying with regulations in recommending that an AFR 39-17 Board consider applicant's fitness for retention in the service. The Board found applicant unfit by reason of habits or traits of character manifested by chronic alcoholism. The commander and the Board had full knowledge that applicant's performance of duty was excellent when he was on the job; however, he was a constant disciplinary problem due to excessive use of alcohol and resulting absence, incapacity and disorderly conduct which negated his value to the service. There was no evidence, medical or otherwise, that he had any mental or physical disability that would warrant processing his case through medi-

cal channels. Applicant's alcoholism has never been considered to have been caused by psychiatric disease which would be compensable under service and VA regulations. It is our opinion that the findings and recommendations of the AFR 39-17 Board are fully sustained by the evidence.

28. Careful study of the facts and circumstances of this case leads to the conclusion that applicant's alcoholism resulted from intemperate and wanton overindulgence in alcohol and was thus due to his own intentional misconduct. Applicant has failed to demonstrate that an error or injustice exists in his case and his application should be denied. It is stressed that this finding is based only upon service following the reenlistment contracted 14 February 1952.

(d) The Air Force Board for Correction of Military Records recommended that the plaintiff's second application be denied.

(e) On December 18, 1961, an Assistant Secretary of the Air Force approved the recommendation of the Air Force Board for Correction of Military Records and denied the plaintiff's second application for relief.

19. At the time pertinent to this litigation, Air Force Regulation No. 39-17 (9 February 1954) provided in part as follows:

1. **Purpose and Scope.** This Regulation outlines the conditions and procedures, and constitutes the authority within the Air Force for the discharge of enlisted personnel * * * serving on active duty for unfitness. * * *

2. **Policy.** All commanders will maintain high personnel standards within the Air Force. Constant attention will be given to the problem of early recognition of unfit airmen and elimination in cases where rehabilitation has proven impossible or im-

practical. An airman will not be reassigned who has demonstrated unfitness for any of the reasons listed in paragraph 3a, until proceduce outlined herein has been followed, except as provided in paragraph 5. Commanders who thus avoid proper disposition of substandard airmen are not accepting their command responsibility, create serious morale problems in the gaining unit, and add to the cost of final elimination.

a. The discharge of enlisted personnel under this Regulation will be accomplished only after:

(1) Conclusive determination has been made that a mental or physical defect does not exist which would warrant consideration under AFM 35-4.

(2) Definite determination has been made that, for any of the causes mentioned in this Regulation, the person cannot be rehabilitated to the extent where he may be expected to become a satisfactory airman. Action will not be taken under this Regulation in lieu of disciplinary action.

* * * *

3. **Procedure.** The procedure to be followed in reporting airmen for board action with a view to separation for unfitness and subsequent action required are set forth in a and b below. Care will be exercised in the evaluation of an airman prior to recommending that he appear before a board of officers or be discharged for any of the reasons indicated. When appropriate, all aspects of the character guidance program will be employed prior to making such recommendations.

a. *Commander's Report.* When an airman has demonstrated that he is unfit for further retention in the military service for any of the reasons indicated in (1) and (2) below and his rehabilitation is considered impracticable after repeated attempts to accomplish same have failed (except where at-

tempts at rehabilitation are impracticable as in confirmed drug addiction), his commander will report the facts (see b below) to the next higher command and recommend that the airman be required to appear before a board of officers convened under the authority contained herein. The commander will make such a report if the airman:

(1) Gives evidence of habits or traits of character manifested by antisocial or amoral trend, *chronic alcoholism*, criminalism, sexual perversion, drug addiction, pathological lying, or other misconduct. * * * [Emphasis supplied.]

* * * *

b. *Composition of Report.* The commander's report will include the following data:

* * * *

(9) Report of medical officer, including statement that there are no mental or physical defects sufficient to warrant consideration under AFM 35-4. When applicable, report of psychiatric examination will be obtained. * * *

* * * *

4. **Application for Discharge.** Airmen who do not hold a Reserve commission will be afforded the opportunity to request discharge in lieu of board action.

* * * *

5. **Action When Airman Does Not Sign Application.** Except when other disposition of the case is considered warranted by intermediate commanders, including reassignment of the airman to another section or unit, the report will be forwarded to the immediate wing or comparable level commander who will, if he considers such action appropriate, convene a board of officers to determine whether the airman should be discharged for unfitness. * * *

a. *Medical Evaluation.* An airman scheduled to appear before the board will first appear before the unit medical officer or base surgeon. This medical officer will ascertain whether any mental or physical defect or sufficient import to warrant action under AFM 35-4, exists.

(1) When physical or mental defects of major import are not involved, the medical officer will submit to the board a concise report in which the essential points of the mental and physical condition of the airman are described, to include a statement that there are no mental or physical defects which would warrant action under AFM 35-4. Unless the respondent, his counsel, or the board requests the presence of the medical officer before the board, this report will be received and considered by the board without requiring the medical officer to appear.

* * * *

b. *Board Convened by Immediate Wing or Comparable Level Commander.* Boards of officers will be convened under this authority by the wing or comparable level commander and will consist of not less than three nor more than five officers, at least one of whom is of field grade. One member of the board will be a legal officer or officer possessing legal experience, if available, especially in instances where the airman is represented by counsel. * * *

* * * *

c. *Board Procedure.*

* * * *

(3) An airman appearing before a board of officers convened under this Regulation is entitled to military counsel of his own selection if reasonably available. The airman may retain civilian counsel at no expense to the Government. If military counsel of the airman's own choosing is not available, competent military counsel will be furnished by the convening authority. However, if the person specifically

declines counesl in writing, counsel need not be furnished.

* * * *

d. *Authorized Recommendations:*

(1) The board will recommend that the person be:

(a) Discharged because of unfitness and given an undesirable discharge, or

(b) Discharged because of unsuitability under AFR 39-16, and given a general discharge, or

(c) Retained in the service.

* * * *

(3) Discharge, if recommended, will be for unfitness, except that discharge because of unsuitability (under AFR 39-16 without referral to another board) may be recommended in borderline cases if military circumstances and the character of service rendered by the airman during his current period of service so warrant. As examples, such circumstances would apply where the cause of unfitness has been minor, regarding the length of efficient service or where there has been a definite effort at self-control, or where an airman has, during his current period of service, distinguished himself by an act of heroism which in itself reflected great credit on the airman and the military service.

* * * *

f. *Action by Convening Authority:*

(1) Board proceedings will be closely examined by the convening authority and a determination made on the propriety of action recommended.

(2) The convening authority will forward the board proceedings with his recommendation to the commander exercising general court-martial jurisdiction (herein-after referred to as the "approving authority").

g. Action by Approving Authority:

(1) Board proceedings will be closely examined and a determination made on the propriety of action recommended. This examination will include a review by the staff judge advocate for legal sufficiency.

(2) The approving authority in person will approve the action recommended by the board or direct other appropriate disposition of the case. This authority will not be delegated.

* * * *

8. Form of Discharge Certificate To Be Given. When discharged because of unfitness, DD Form 258 AF, "Undesirable Discharge," will be furnished. When discharged because of unsuitability, DD Form 257AF, "General Discharge," will be furnished.

* * * *

20. (a) At the time pertinent to this litigation, the foreword to Air Force Manual 35-4, covering the subject of "Physical Evaluation for Retention, Retirement and Separation [of Military Personnel]," stated in part as follows:

1. *Purpose and Scope.* This Manual prescribes the procedure and sets forth the authority for the retention, retirement, and separation of members of the Air Force with physical defects or disabilities which render such members unfit. * * *

2. *Statutory Authority.* P.L. 351, 81st Cong., Career Compensation Act of 1949 * * * which generally superseded previous provisions of law relating to physical disability retirement, provides requirements for determining eligibility for physical disability retirement and provisions for separation with severance pay by reason of physical disability. This statute is uniform in its application to all members without regard to component or grade. The provisions of the Career Compensation Act of 1949 and

certain other applicable laws are explained in detail in section II, chapter 1.

(b) Paragraph 1 of section I of chapter 1 of the manual cited in paragraph (a) of this finding contained the following definitions (among others):

> i. **Physical Disability**—A physical or mental condition arising from one or more physical defects and which may render a member unfit to perform the duties of his office, rank, or grade.
>
> * * * *
>
> n. **Physically Unfit or "Unfit"**—Physical inability to perform the duties of the office, rank, or grade held, which are required during the performance of full military duty, field as well as garrison, in both peace and war.
>
> * * * *
>
> q. **Incurred**—Appearing herein as part of the phrase "physical disability incurred while entitled to receive basic pay," refers to the coming into being, while the member is entitled to receive basic pay, of physical disability rendering such member unfit to perform the duties of his office, rank, or grade.
>
> r. **Duties of Office, Rank, or Grade**—The duties of the particular office, rank, or grade, which are required in the performance of full military duty, field as well as garrison, in both peace and war.

(c) Paragraph 7 of section II of chapter 2 of the manual cited in paragraph (a) of this finding provided as follows:

> 7. *Refferral to Medical Board*
>
> A patient who is unfit or whose fitness for further general military service appears, for medical reasons, to be in doubt will be referred to a medical board. The medical board consists of three or more officers appointed by the surgeon or hospital com-

mander and convened at his direction or by the direction of the president thereof. The medical board is a clinical body and the person whose case is considered is a patient. The function of the medical board is to insure that the case has been clinically completed to the extent that the hospital staffing and facilities permit, establish the diagnosis, make recommended findings of fitness and unfitness, and make appropriate recommendations of action on the disposition of the patient. The board will be conducted in accordance with the instructions of the appointing authority, and principles of AFR 14-20.

21. As of July 1, 1954, paragraph 1-i of section I, chapter 1, Air Force Manual 35-4, was revised to provide as follows:

i. **Physical Disability**—Any manifest or latent impairment of function due to disease or injury regardless of the degree of impairment. The presence of physical disability does not necessarily require a finding of unfitness for duty. The term "physical disability" includes mental diseases other than such inherent defects as behavior disorders, personality disorders, and primary mental deficiency.

(1) Impairment of function is hereby defined as any lessening or weakening of the capacity of the body or any of its parts, to perform that which is considered by accepted medical principles to be the normal activity in the bodily economy.

(2) Manifest impairment is defined as that which is accompanied by signs and/or symptoms.

(3) Latent impairment is defined as that which is not accompanied by signs and/or symptoms but which is of such a nature that there is reasonable and moral certainty, according to accepted medical principles, that signs and/or symptoms will appear within a reasonable period of time.

22. The plaintiff was not, at the time of his undesirable discharge mentioned in finding 14, or in the several months immediately preceding such discharge, referred to a medical board, within the meaning of paragraph 7 of section II of chapter 2 of Air Force Manual 35-4 (see finding 20(c)).

23. (a) Under the Veterans Administration Schedule for Rating Disabilities in current use at the time of the plaintiff's discharge on July 1, 1954, a splenectomy was rated as a 30-percent disability under code number 7706.

(b) The plaintiff has been denied compensation for such disability under laws administered by the Veterans Administration.

24. The plaintiff's entire service from February 8, 1949, to July 1, 1954, is considered by the Veterans Administration as one continuous period of service; and since the plaintiff was not discharged therefrom under conditions other than dishonorable, he is not entitled to benefits under laws administered by the Veterans Administration on such period of service.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

IN THE UNITED STATES COURT OF CLAIMS

* * * *

256 GEORGE NEFF ROWE) v. THE UNITED STATES

* * * *

ORDER

These cases come before the court on motions or petitions for rehearing, reconsideration, to alter, amend or set aside judgments and orders, to amend findings of fact, for reversal of order, for new trial, for oral presentation, motion according to Federal Rules of Civil Procedure, and for other relief, under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this sixteenth day of October, 1964, that said motions be and the same are denied as follows:

* * * *

256 George Neff Rowe. Plaintiff's motion.

* * * *

BY THE COURT

DON N. LARAMORE
Acting Chief Judge

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 829

GEORGE NEFF ROWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 19) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 17, 1964. The order of that court denying petitioner's timely motion for rehearing was entered on October 16, 1964 (Pet. App. 43). The petition for a writ of certiorari was filed on January 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether a discharge "for unfitness" awarded administratively under Air Force Regulation 39–17 is punitive in character.

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2. Whether the Air Force followed its own regulations in discharging petitioner.

REGULATION INVOLVED

Air Force Regulation 39–17 provides in pertinent part:

> 2. POLICY. All commanders will maintain high personnel standards within the Air Force. Constant attention will be given to the problem of early recognition of unfit airmen and elimination in cases where rehabilitation has proven impossible or impractical. An airman will not be reassigned who has demonstrated unfitness for any of the reasons listed in paragraph 3a, until procedure outlined herein has been followed, except as provided in paragraph 5. Commanders who thus avoid proper disposition of substandard airmen are not accepting their command responsibility, create serious morale problems in the gaining unit, and add to the cost of final elimination.
>
> a. The discharge of enlisted personnel under this Regulation will be accomplished only after:
>
> (1) Conclusive determination has been made that a mental or physical defect does not exist which would warrant consideration under AFM 35–4.
>
> * * * * *
>
> 3. PROCEDURE.
>
> * * * * *
>
> a. *Commander's Report.* When an airman has demonstrated that he is unfit for further retention in the military service for any of the reasons indicated in (1) and (2) below and his rehabilitation is considered impracticable after repeated attempts to accomplish

same have failed (except where attempts at rehabilitation are impracticable as in confirmed drug addiction), his commander will report the facts (see b below) to the next higher command and recommend that the airman be required to appear before a board of officers convened under the authority contained herein. The commander will make such a report if the airman:

(1) Gives evidence of habits or traits of character manifested by antisocial or amoral trend, *chronic alcoholism,* criminalism, sexual perversion, drug addiction, pathological lying, or other misconduct. * * * [Emphasis supplied.]

* * * * *

b. *Composition of Report.* The commander's report will include the following data:

* * * * *

(9) Report of medical officer, including statement that there are no mental or physical defects sufficient to warrant consideration under AFM 35–4. When applicable, report of psychiatric examination will be obtained. * * *

STATEMENT

On February 14, 1952, after passing his physical examination and being certified for duty without restriction, petitioner was accepted for reenlistment in the Air Force for a six year term. Between June 26, 1953, and April 21, 1954, petitioner was punished seven times for offenses involving intoxication. He was counseled after each of these occurrences by his superiors. Finally, on May 20, 1954, after certification by a medical officer that petitioner was a

chronic alcoholic and that he suffered from no mental or physical defect warranting his discharge as disabled under AFM 35–4, the commanding officer of petitioner's organization recommended that petitioner appear before a board convened under AFR 39–17, *supra,* pp. 2–3, to determine petitioner's fitness for retention in service. On May 28, 1954, petitioner, with his counsel, appeared before this board and was afforded a full hearing. The board found petitioner to be a chronic alcoholic and recommended that he be discharged for unfitness and given an undesirable discharge. On July 1, 1954, after the prescribed approval of the board's recommendation, petitioner was issued an undesirable discharge (Pet. App. 28–32).

Pursuant to petitioner's request to review the character of his discharge he was granted a hearing by the Air Force Discharge Review Board at which time he was again represented by counsel and was permitted to testify. The Board's recommendation that no change be made in petitioner's discharge was approved by the Secretary of the Air Force (Pet. App. 32).

Petitioner thereafter sought a change in the nature of his discharge from the Air Force Board for Correction of Military Records. After a hearing at which he testified and was represented by counsel, the Board's recommendation that petitioner's application be denied was adopted by the Assistant Secretary of the Air Force (Pet. App. 32–34).

Petitioner thereafter brought this action in the Court of Claims, seeking recovery of back pay on the claim that his discharge was void. In dismissing

his petition, the Court of Claims held (1) that petitioner's administrative discharge was not punitive and that, therefore, there was no infringement upon his rights by the failure to discharge him by court-martial under the Uniform Code of Military Justice; and (2) that the Air Force regulations for administrative discharges had been observed.

ARGUMENT

The judgment of the Court of Claims is correct and not in conflict with the decision of any other court. Accordingly, no question is presented meriting review by this Court.

1. Upon the premise that a discharge "for unfitness" under Air Force Regulation 39–17, *supra*, pp. 2–3, is punitive, petitioner contends: (1) that he was placed in double jeopardy in violation of the Fifth Amendment and of the Uniform Code of Military Justice [1] because he had already been punished for his seven offenses involving intoxication; and (2) that the Secretary of the Air Force did not have the power to eliminate petitioner from the Air Force through an administrative discharge under AFR 39–17 but was compelled to proceed by way of court-martial under the Uniform Code of Military Justice.

The short answer to petitioner's contentions is that a discharge for unfitness under the regulation is not punitive. The distinction between punitive "dishonorable" and "bad conduct" discharges issued pursuant to court-martial proceedings and "general" or "un-

[1] Article 44(a) of the Uniform Code of Military Justice 70A Stat. 52, 10 U.S.C. 844(a) provides "No person may, without his consent, be tried a second time for the same offense."

desirable" discharges resulting from administrative action is well recognized. See *United States* v. *Kingsley*, 138 U.S. 87, 90–92; *Grant* v. *United States* (Ct. Cl. No. 30–62, decided July 12, 1963), slip opinion, p. 8; *Reid* v. *United States*, 161 Fed. 469, 472 (S.D.N.Y.), appeal dismissed, 211 U.S. 529; *Matter of Nistal* v. *Haasauer*, 308 N.Y. 146, 154, 124 N.E. 2d 94, 98, certiorari denied, 349 U.S. 962.[2] Petitioner was given an undesirable discharge because, as a chronic alcoholic, he was unfit to serve as an airman. His discharge was intended not to punish, but to promote the efficiency of the service by eliminating a member whose retention would adversely affect morale and discipline. See AFR 39–17(2). Prior to his discharge, petitioner was given the benefit of full hearings with the assistance of counsel before the discharge board convened under the regulation, the Air Force Discharge Review Board and the Air Force Board for Correction of Military Records.[3]

2. Petitioner's final contention is that the procedures prescribed by the regulation for awarding an administrative discharge under AFR 39–17 were not observed. Specifically he claims that the Air Force failed to make a conclusive determination, as required

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[2] See also, Davis, *A Treatise on the Military Law of the United States* (3d ed., 1913), pp. 353–355, 356–357; Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1912), p. 435; Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?* 41 Cornell L.Q. (1956) 545, 552–568; Winthrop, *Military Law and Precedents* (1920 ed.), p. 549.

[3] Such procedures were lacking in *Clackum* v. *United States*, 296 F. 2d 226 (Ct. Cl.), upon which petitioner relies (Pet. 11–12).

by AFR 39–17(2)(a), that there was no mental or physical defect warranting discharge for disability under AFM 35–4. As the Court of Claims found, this is simply not correct. Petitioner was examined prior to his discharge by a medical officer, who was a psychiatrist. His report certified that petitioner was a chronic alcoholic and there were no physical or mental defects warranting treatment under AFM 35–4 (Pet. App. 30).[4]

CONCLUSION

For the above reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

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Attorneys.

MARCH 1965.

[4] Petitioner challenges this report because it makes no mention of his prior head injury or splenectomy, but the failure of the medical officer to make specific reference to these two circumstance is immaterial. Both had occurred prior to his renlistment in 1952 at which time petitioner passed his physical examination and was accepted for duty without restriction. No suggestion has ever been made that petitioner in fact suffered any disability from them or that he had not completely recovered. Petitioner, rather, attempts to cast doubt upon the medical officer's certification by noting that a splenectomy was then ratable under the Veterans Administration Schedule for Rating Disabilities as a 30% disability. The Veterans Administration disability ratings, however, are based upon statutes, regulations and policies far different from those governing retirement or discharge. *Holliday* v. *United States*, 128 Ct. Cl. 647, 649.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

GEORGE NEFF ROWE,
Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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GEORGE NEFF ROWE,
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v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

It is not petitioner's intention to deal in minutiae in this Reply to the Brief for the United States in Opposition. It is assumed that with the petition, opposition, and record before them, the honorable Justices will not be misled as to the applicable facts and, more importantly, as to the significance of the issues.

The Solicitor recognizes that an issue is whether an Undesirable Discharge constitutes punishment. Except for a New York case, *Matter of Nistal* v. *Hausauer*, 38 N.Y. 1946, 154, 124 N.E. 2d 94, 98, *cert. denied*, 349 U.S. 962 (involving a discharge from the National Guard by a State Governor prior to the Uniform Code of Military Justice), the cases cited by the Solicitor arose over

a half century ago, or in the case of *Grant* v. *U.S.* (C.Cls. No. 30-62, decided July 12, 1963) did not involve an Undesirable Discharge. Indeed, when *Reid* v. *United States*, 161 Fed. 469, reached this Court on a writ of error, jurisdiction was refused on the grounds that the amount involved was less than $3,000, with no opinion being expressed as to merits of Reid's claim, 211 U.S. 529 (1909).

The petitioner finds quite surprising that the Solicitor apparently sees no conflict between the opinions such as *Reid* v. *U.S.*, *supra; Jackson* v. *U.S.*, C.Cls 1962, 297 F.2d 939; *Grant* v. *U.S.*, *supra;* and *Brown* v. *U.S.*, C. Cls. 1960, 150 C.Cls. 836, on one hand and on the other hand opinions such as *Clackum* v. *U.S.*, C.Cls. 1960, 296 F.2d 228; *Murray* v. *U.S.*, C.Cls. No. 237-57, decided June 7, 1961; *Bland* v. *Connally*, C.C.A.D.C. 1961, 293 F.2d 852; *David* v. *Stahr*, C.C.A.D.C. 1961, 293 F.2d 860; and *Sofranoff* v. *U.S.*, C.Cls. No. 9-62, decided April 17, 1964. The latter cases, particularly *Clackum* and *Bland*, leave no room for doubt but that the undesirable type of discharge was considered punitive in nature.

The only modern citation by the Solicitor in note 2 on page 6: the article *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?* by Robert Pasley, is of little comfort to him. The article deals with the legality of the dishonorable discharges given to the Korean turncoats by administrative fiat. Pasley indicates certain legal differences between the dishonorable discharges awarded by a court-martial and the undesirable discharges awarded administratively, but he acknowledges that the practical effect of each discharge in the eyes of the public is approximately the same. He quotes doubts attributed to Winthrop as to the legality of the forerunner of the Undesirable Discharge, that is, the Discharge without Honor.

The Solicitor fails completely to oppose petitioner's contention that alcoholism is a disease and therefore a

physical disability under the applicable Air Force regulations. This case is unique in that the only evidence which the Air Force had during the petitioner's current enlistment upon which to base the Undesirable Discharge were those episodes for which the petitioner had already been punished under the Uniform Code of Military Justice (often beyond the maximum limits of the Code). Take these away, not only was the petitioner's service good but there is affirmative evidence from the individuals who sought his discharge to the effect that it was excellent.

Petitioner is not contesting the right of the Air Force to discharge him at any time. What he contests is the legality of any discharge which at the same time punishes or of a discharge for a physical disability without opportunity for the statutory full and fair hearing on the germane issues.

The Solicitor seems not to understand that the regulations pursuant to which the petitioner was given his Undesirable Discharge plainly prescribed not one, but two physical examinations—one for the commander recommending the discharge in the first instance and another for the board which considered same. While the petitioner may have received the former (however carelessly accomplished it may have been), he certainly did not receive the latter.

The Solicitor attempts to excuse the sketchy nature of petitioner's examination and report which, among other things, forgot even to mention petitioner's splenectomy—a thirty percent disability under the Veterans Administration Schedule for Rating Disabilities—on the grounds that such ratings are based upon statutes, regulations and policies far different from those governing retirement or discharge. They are, of course, different. But how far different is another matter. The Veterans Administration ratings are based as far as practicable upon the

average impairment of the earning capacity resulting from the injuries in civilian occupations. In this light, it is clear that a thirty percent disability can hardly be stated to be minimal even insofar as the military is concerned. And the responsibility to make the "conclusive determination" that a mental or physical defect did not exist which would warrant petitioner's consideration for retirement or separation by reason of physical disability was for officials aside from the medical officer. While it is probable that the medical officer was not aware of petitioner's splenectomy or he would have mentioned it in his report, it is almost a certainty that the petitioner's commander or the board could hardly have been aware of such disability if not reported by the medical officer.

The truth of the matter is that the record as a whole discloses a slipshod and arbitrary treatment of the petitioner from first to last.

The case not only contains important questions which are ripe for consideration by this Court but also presents a good test case in that the facts are relatively clean with few areas for equivocation.

Petitioner contends that the time has come to wipe out the involuntarily issued Undesirable Discharge. Punishment of this severity should be dispensed with the safeguards of the Uniform Code of Military Justice or not at all. In this respect, petitioner's situation is far from unique. Even where the Uniform Code of Military Justice contemplates no punitive discharge and still affords considerable protection of the basic rights of servicemen, administrative means are being utilized daily for the issuance of derogatory discharges every bit as odious and, for all practical purposes, as punitive as those issued by court-martial. The standards are vague and rudiments of fair play fall far short of those imposed by the Uniform Code of Military Justice. Yet by such

prescription, thousands of young men are yearly being returned to their communities under a label of dishonor and are severely handicapped in their future adaptability and usefulness to society. Indeed, petitioner questions the constitutionality of such discharges, per se.

Many prominent authorities have expressed doubt as to the legality of the procedure. Its harsh effects should not be ignored and it is submitted that questions of fundamental importance are involved. It is an evil of which this Court should take cognizance.

Respectfully submitted,

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